

LOUIS MIELE

Claimant-Petitioner

v.

AMERADA HESS OIL COMPANY

and

ROYAL INSURANCE COMPANY

Employer/Carrier-
Respondents

DATE ISSUED:

DECISION and ORDER

Appeal of the Compensation Order - Award of Attorney's Fees of Richard V. Robilotti,
District Director, United States Department of Labor.

Philip J. Rooney (Israel, Adler, Ronca & Gucciardo), New York, New York, for claimant.

Before: DOLDER, Acting Chief Administrative Appeals Judge, SMITH, Administrative
Appeals Judge, and SHEA, Administrative Law Judge.*

PER CURIAM:

Claimant appeals the Compensation Order - Award of Attorney's Fees (2-83120) of District Director Richard V. Robilotti rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). The amount of an attorney's fee award is discretionary and may only be set aside if shown by the challenging party to be arbitrary, capricious, an abuse of discretion or not in accordance with the law. *See Roach v. New York Protective Covering Co.*, 16 BRBS 114 (1984); *Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

*Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C. §921(b)(5)(1988).

The facts, as set forth by claimant¹ in his Petition for Review, are as follows: Claimant

¹It is impossible to verify the accuracy of these facts from the scanty record before us.

sustained compensable injuries on January 24, 1984. Employer has voluntarily paid claimant temporary total disability benefits to date without interruption, and has also accepted liability for his medical expenses. A dispute apparently developed between the parties over the compensability of certain medical expenses and over claimant's entitlement to permanent total disability compensation. *See* 33 U.S.C. §908(a). The case was referred to the Office of Administrative Law Judges for a formal hearing on March 30, 1987. The case, however, was apparently remanded to the district director in October 1987. On September 9, 1991, the district director sent a letter to claimant which stated that based on the final vocational report submitted, dated May 22, 1989, which indicated that claimant is not a candidate for rehabilitation services, claimant should be declared permanently totally disabled as of October 1, 1989. In this letter, the district director advised the claimant that if the parties agreed to this declaration in writing, claimant would be entitled to Section 10(f), 33 U.S.C. §910(f), annual cost-of-living adjustments dating back to October 1, 1989, as well as future cost-of-living adjustments.

On February 21, 1992, claimant's counsel William R. Johnson filed a fee petition with the district director, requesting \$24,762.50 representing 116.75 hours of attorney services at \$150 per hour, 116.75 hours of secretarial services at \$60 per hour, and \$245 in expenses.²

On February 26, 1992, after considering the value of the attorney's services to the claimant, the complexity of the case, the amount of time involved, the results achieved, and "other factors" including the professional expertise of claimant's attorney, the district director awarded claimant's counsel a fee of \$10,000, payable by claimant as a lien upon his compensation. *See* 33 U.S.C. §928(c). Claimant filed an appeal of the district director's fee award on various grounds on his own behalf. Thereafter, claimant obtained new counsel, who filed the brief in this case. Employer has not responded to claimant's appeal.

On appeal, claimant contends that the district director erred in holding him liable for his attorney's fee without first determining whether the fee should be assessed against employer pursuant to Section 28(b) of the Act, 33 U.S.C. §928(b). Claimant further asserts that the time claimed between March 30, 1987, and October 27, 1987, while the case was before the administrative law judge, is not compensable and that the district director erred in awarding a fee for various services and costs³ incurred in connection with a third-party civil claim. Claimant also asserts that because the district director failed to identify which services were being compensated or denied, and failed to identify the applicable hourly rate, it was impossible to determine the basis for the \$10,000 fee award.⁴ Finally, claimant asserts that, even assuming that the fee is payable by

²There are no objections from employer in the file.

³The costs in question included an index number fee paid to the New York Supreme Court of \$175 and a \$75 fee paid for a Request For Judicial Intervention.

⁴Claimant also points out that, although the fee petition requested 116.75 hours in attorney services and 116.75 hours in clerical services, only the attorney services claimed were itemized. Claimant further asserts that clerical services are generally not compensable because they are a part

claimant, the fee award cannot be upheld because the district director failed to adequately evaluate the fee petition in light of the regulatory criteria of 20 C.F.R. §702.132; most significantly, he failed to take into account claimant's ability to pay the \$10,000 fee awarded. Accordingly, claimant urges the Board to vacate the fee award and remand the case to the district director for reconsideration.

We agree with claimant that the district director's fee award must be vacated. With regard to liability, while a claimant may be held liable for his attorney's fee under Section 28(c), 33 U.S.C. §928(c), claimant is liable only if the employer cannot be liable under Section 28(a) or (b), 33 U.S.C. §928(a), (b). In this case, the district director failed to make any findings as to whether liability should be imposed upon employer. Pursuant to Section 28(b), when an employer voluntarily pays or tenders benefits and thereafter a controversy arises over additional compensation due, the employer will be liable for an attorney's fee if the claimant succeeds in obtaining greater compensation than that which employer agreed to pay.⁵ See 33 U.S.C. §928(b); *Tait v. Ingalls Shipbuilding, Inc.*, 24 BRBS 59 (1990). Because the district director failed to make specific findings regarding fee liability, we vacate his finding that claimant is liable for his counsel's attorney's fee as a lien upon his compensation award. The case is remanded for the district director to reconsider this issue consistent with this opinion. On remand, in the event that the district director determines that claimant is liable for his counsel's fee as a lien upon his compensation award, as claimant correctly avers, the fee ultimately awarded must take into account the financial circumstances of the claimant in addition to other relevant factors. 20 C.F.R. §702.132(a).

We also agree with claimant that the district director's failure to identify and explain which services were allowed and disallowed and to identify the applicable hourly rate renders his fee award arbitrary. See *Devine v. Atlantic Container Lines, G.I.E.*, 23 BRBS 280, 288 (1990) (Lawrence, J., concurring and dissenting on other grounds). Accordingly, we vacate the fee award and remand for the district director to provide a full explanation of the fee award consistent with the regulatory criteria of 20 C.F.R. §702.132. See *Speedy v. General Dynamics Corp.*, 15 BRBS 448 (1983).⁶

of office overhead.

⁵As employer made voluntary payments of compensation, Section 28(a) is not applicable. Counsel is only entitled to attorney's fees payable by employer in this case in the event that claimant obtained greater compensation than that originally paid or tendered by employer pursuant to Section 28(b) of the Act, 33 U.S.C. §928(b). See *Kaczmarek v. I.T.O. Corporation of Baltimore, Inc.*, 23 BRBS 376, 379 (1980). There is nothing in the current file which indicates whether "additional compensation" was obtained.

⁶In entering the fee award on remand, the district director should note that he may only award a fee for services performed while the case was before him. An attorney's fee for work performed before the administrative law judge must be awarded by the administrative law judge. See generally *Miller v. Prolerized New England Co.*, 14 BRBS 811 (1981), *aff'd*, 691 F.2d 45, 15 BRBS 23 (CRT) (1st Cir. 1982); 20 C.F.R. §702.132(a). The district director should further note that, as claimant asserts, clerical services are generally not compensable because they are viewed as a part of office overhead. See *Morris v. California Stevedore & Ballast Co.*, 10 BRBS 375 (1979). Moreover, time spent in performing work to obtain a third-party recovery for the claimant is generally not

compensable. *See Kahny v. Arrow Contractors of Jefferson, Inc.*, 15 BRBS 212 (1982), *aff'd sub nom. Kahny v. Director, OWCP*, 729 F.2d 777 (5th Cir. 1984)(table). A fee may be awarded, however, for services performed in connection with collateral actions if counsel shows that the same services and/or their products are necessary to, and are used in prosecution of, the federal workers' compensation claim. *See Roach v. New York Protective Covering*, 16 BRBS 114 (1984); *Eaddy v. R.C. Herd & Co.*, 13 BRBS 455 (1978). Charges incurred in filing and withdrawing a state claim, however, are not recoverable under the Act. *See Jenkins v. Maryland Shipbuilding & Dry Dock Co.*, 6 BRBS 550 (1977), *rev'd on other grounds*, 594 F.2d 404, 10 BRBS 1 (4th Cir. 1979).

Accordingly, the Compensation Order - Award of Attorney's Fees of the district director is vacated, and the case is remanded for reconsideration of the attorney's fee award consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Acting Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

ROBERT J. SHEA
Administrative Law Judge